In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-701.

ALEXANDER T. ARTHURS, M.D.,
PETITIONER,
v.
CHRIS O. STERN,
AS SHE IS EXECUTIVE SECRETARY OF THE BOARD OF REGISTRATION AND DISCIPLINE IN MEDICINE OF THE COMMONWEALTH OF MASSACHUSETTS,
AND
THE MEMBERS OF THE BOARD OF REGISTRATION AND DISCIPLINE IN MEDICINE,
AND
THE DIVISION OF HEARING OFFICERS OF SAID COMMONWEALTH,
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Respondents' Brief in Opposition to Certiorari.

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Respondents' Brief in Opposition to Certiorari.

Questions Presented.

1. Has petitioner's case become moot?
2. Is a state statute consonant with the Due Process Clause of the Fourteenth Amendment if it precludes physicians charged with professional misconduct from seeking an indefinite continuance of disciplinary proceedings solely on the ground that criminal charges pertaining to the same underlying conduct are pending?

3. Is denial of certiorari warranted when problems of ripeness and abstention, laid to rest by the circuit court's decision upholding the statute, would spring to life and render inappropriate analysis of the claims set forth in the petition?

Statement of the Case.

The petition seeks review of a decision upholding an important part of the Commonwealth's scheme for regulating professions affecting health and welfare. Petitioner's complaint for declaratory and injunctive relief in the district court claimed that M.G.L. c. 112, § 63 (West 1971) (the statute) was unconstitutional. Petitioner asserted that the statute exposed him to the possibility that the respondent members of the Board of Registration and Discipline in Medicine (the board) might draw an "adverse inference" against him for failing to testify on his own behalf in a disciplinary proceeding and, relying in part upon this inference, might suspend or revoke his license to practice medicine. Respondents answered the complaint, and the court held a merged hearing on petitioner's motion for preliminary relief and the merits. After hearing, the court entered an order enjoining the respondents from relying upon the statute. The First Circuit reversed. Petitioner's petition followed.

The board[1] is an agency of the Commonwealth created by St. 1975, c. 362,[2] to license, supervise, and discipline persons engaging in the practice of medicine.

[1] The board has seven members, all of whom are named respondents. The two additional respondents are the board's Executive Secretary, and a hearing officer employed by the Division of Hearing Officers, Executive Office of Administration and Finance.

[2] The 1975 statute significantly strengthened the institutional structure for licensing and disciplining medical professionals. The regulation of the medical profession dates back to 1894, *see* St. 1894, c. 458, and constitutes a primary component of the state's health care regulatory framework.

The board's disciplinary proceedings are conducted pursuant to statutory authority and a set of specific regulations. The process which the board normally follows in disciplinary cases fits a pattern common to many such professional oversight agencies. Upon receipt of a complaint against a licensed physician, the board's Complaint Committee commences an investigation. If the Complaint Committee determines that there is reason to believe that the physician complained of has violated the law, it refers the matter to the board, which determines whether to dispose of the matter informally or to commence an adjudicatory hearing[3] by issuing an order to show cause. In its discretion, the board determines whether to conduct the adjudicatory hearing itself or to refer the matter to a hearing officer. In petitioner's case, the board decided to use a hearing officer because the issues did not involve technical medical questions.[4]

The proceedings began formally on October 1, 1976, when the board sent petitioner an order to show cause why he should not be subjected to disciplinary action for violation of M.G.L. c. 94C, § 19(a) (West 1972), the Common-

[3] An adjudicatory hearing is a procedure governed by the provisions of the state Administrative Procedure Act (APA), M.G.L. c. 30A, §§ 10-11.

[4] In cases tried initially to a hearing officer, the board's regulations and the state APA require the hearing officer to prepare a proposed decision upon the request of a party. M.G.L. c. 30A, § 11(7) (West 1966). A party then has the right to file objections to the proposed decision, and the board, upon motion, may permit oral argument on them. On the basis of the record thus compiled, the board makes its final decision, and pursuant to M.G.L. c. 112, § 64 (West 1971), an aggrieved defendant may seek judicial review of the board's decision in the Supreme Judicial Court.

wealth's Controlled Substances Act. A hearing on the merits was scheduled before the hearing officer for November 18, 1976. On November 10, 1976, petitioner filed a motion to dismiss and a motion to continue proceedings. At the November 18th hearing, which was confined to argument on the two motions, the hearing officer denied both of them. He then set a new date for the hearing on the merits, with the agreement of counsel, of December 23, 1976.

Petitioner filed his complaint in the district court on December 14, 1976. It included a series of allegations, the gist of which was that the statute was unconstitutional because it forced petitioner to defend himself in a disciplinary proceeding while a criminal indictment was pending. After the filing of an agreed statement of facts on January 10, 1977, and a combined hearing on petitioner's motion for a preliminary injunction and the merits on January 20, 1977, the district court, on February 1, 1977, issued an order enjoining respondents "from relying upon Mass. Gen. Laws. ch. 112, § 63 in denying plaintiff's request for a continuance of the Board's proceedings pending resolution of the criminal charges lodged against plaintiff in Middlesex Superior Court . . ." (Appendix to Petition [Pet. App.] 1a).

The district court's subsequent opinion concluded that because "§ 63 does impermissibly force the plaintiff to choose between his privilege against self-incrimination and his right under the Due Process Clause to testify in defense of his liberty and property interest in practicing medicine[,] [i]t is . . . unconstitutional" (Pet. App. 19a).

The circuit court reversed, holding that due process is not offended by requiring a doctor to choose between (a) giving testimony at the disciplinary hearing, a course that may help the criminal process, and (b) keeping silent, a course that may prompt the board to draw an adverse inference about a doctor's conduct.

Reasons for Denying the Writ.

I. The Petition Should be Denied Because Petitioner's Claim has Become Moot.

The circuit court noted in its opinion that

> [a]fter the appeal, but before this opinion issued, one set of criminal charges went to trial. Plaintiff testified at his trial and was acquitted. Other charges are pending, and the board has not attempted to go forward with its proceedings. (Pet. App. 23a.)

The criminal case which is finished charged the petitioner with issuing prescriptions for controlled substances under circumstances which violated M.G.L. c. 94C, § 19(a) (Pet. App. 2a). See Attachment A to this brief. This is the same conduct which prompted the board to commence disciplinary proceedings (Pet. App. 3a, n. 4). The indictments remaining to be tried contain conspiracy counts and do not add substance to the charges before the board. They are scheduled to go to trial in May, 1978. See Attachment B to this brief.

Because petitioner has already testified in the criminal case related to the board's proceeding, the giving of testimony before the board can no longer undermine his privilege against self-incrimination. Petitioner, therefore, is now free of the dilemma which triggered the lawsuit and which led the district court to invalidate § 63 (Pet. App. 19a).

Because his dilemma is resolved, petitioner's claim is moot. *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975). Moreover, no extenuating circumstances exist which might fend off a finding of mootness. *See id.* This is not a class action,

see Sosna v. *Iowa*, 419 U.S. 393 (1975); the governmental conduct in question is not "capable of repetition, yet evading review," and since petitioner has already completed testifying in a criminal setting about the occurrences pertinent to the board's disciplinary proceeding, he will not again encounter the dilemma he posited below. Since the case is moot, the Court should deny petitioner's petition for certiorari.[5]

II. CERTIORARI SHOULD BE DENIED BECAUSE, IN UPHOLDING THE CONSTITUTIONALITY OF THE STATUTE, THE CIRCUIT COURT CORRECTLY INTERPRETED AND APPLIED THIS COURT'S DECISIONS.

A. *A Statute which Precludes the Pendency of a Criminal Action as the Exclusive Basis for an Indefinite Continuance of Disciplinary Proceedings does Not Necessarily Offend Due Process.*

The petitioner is a doctor charged with conduct which, if proved, would have both violated criminal statutes and prompted disciplinary action designed to protect the health and welfare of citizens. He claimed a constitutional right to seek postponement of the disciplinary proceeding until the trial on the criminal charges was over. The circuit court took exception, at least under the facts before it, and concluded:

> Given the strong public interest in promptly disciplining errant physicians taken as a class, we see no reason to hold that the board was or could be constitutionally required to stay its proceedings until the criminal prosecutions against any particular doctor were over. (Pet. App. 26a-27a.)

[5] Petitioner has not sought to vacate the circuit court's judgment on mootness grounds, as he might. In such circumstances the judgment of the circuit court should stand. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 41 (1950). *Cf. Weinstein* v. *Bradford*, *supra*, at 147-148.

Since there existed on this record no constitutional basis for ordering a stay of proceedings, the court held that the district court had erred in using this occasion to enjoin M.G.L. c. 112, § 63, the statute which precluded such stays.[6] It might be that, in other applications § 63 would raise constitutional problems. However, the circuit court found no such problem here, and declared that invalidating § 63 on the basis of speculation about other contexts was inappropriate (Pet. App. 27a).

The circuit court's decision was correct. The allegations, taken as true by the court, assumed that the board would draw an adverse inference from petitioner's determination to remain silent at the disciplinary hearing.[7] Petitioner claimed that requiring him to defend with silence and suffer an adverse inference deprived him of his opportunity to be heard under the Due Process Clause of the Fourteenth Amendment. This Court, however, has made plain that an

[6] Section 63 reads as follows:

> Said boards [of registration] shall not defer action upon any charge before them until the conviction of the person accused, nor shall the pendency of any charge before any of said boards act as a continuance or ground for delay in a criminal action.

[7] There was no evidence on the record that the board would, in fact, draw a negative inference on account of petitioner's silence. Petitioner's constitutional claim therefore was not ripe for adjudication. *See* Part III, *infra*.

adverse inference such as this, in an administrative proceeding, is constitutionally permissible. *Baxter* v. *Palmigiano*, 425 U.S. 308, 318 (1976).[8] To be sure, the state must take care not to attach an automatic penalty to an individual's determination to remain silent before the agency: Citizens must not be "forced to incriminate themselves because it serves a governmental need." *Lefkowitz* v. *Cunningham*, ____ U.S. ____, 97 S. Ct. 2132, 2137 (1977). However, this Court has drawn a decisive distinction between the improper coercion inherent in an automatic penalty and the fair use of inferences in administrative decision-making. In *Lefkowitz* v. *Cunningham*, *supra*, the Court struck down a statute automatically ejecting from office a political party executive for refusing to testify about his official conduct. By way of distinction, the Court, inter alia, stated as follows:

> *Baxter* v. *Palmigiano* . . . is not to the contrary. That case involved an administrative disciplinary proceeding in which the respondent was advised that he was not required to testify, but that if he chose to remain silent his silence could be considered against him. *Baxter* did no more than permit an inference to be drawn in a civil case from a party's refusal to testify. Respondent's silence in *Baxter* was only one of a number of factors to be considered by the finder of fact in assessing a penalty, and was given no more probative value than the facts of the case warranted; here, refusal to waive the Fifth Amendment privilege leads auto-

[8] It is noteworthy that in *Baxter* this Court reversed the First Circuit on the very proposition which petitioner now advances and the First Circuit refuses to accept. The circuit court has thus paid heed to this Court's rejection of the adverse inference line of attack, but petitioner has not.

> matically and without more to imposition of sanctions. 97 S.Ct. at 2138, n. 5.

The circuit court applied this same distinction in rejecting petitioner's due process claim. The district court had failed to see it. The petitioner, in his petition for certiorari, has failed even to address the above footnote in *Lefkowitz* v. *Cunningham* (*see* Petition at 10, 14, n. 7), despite the fact that it is a new decision, issued subsequent to oral argument below, and cited approvingly in the circuit court's opinion.[9]

The petitioner instead relies on *Silver* v. *McCamey*, 221 F.2d 873 (D.C. Cir. 1955), as his only direct support. This case has seldom been cited, even in its own circuit. In *Silver* the court found constitutional infirmity in the holding of a taxi license revocation hearing to consider charges of sexual assault so long as the licensee was also subject to pending criminal prosecution for the same alleged conduct. The court's decision there turned upon contextual considerations of criminal discovery and the availability to the administrative tribunal of sanctions less severe than license revocation. The court below properly rejected petitioner's argument that *Silver* was dispositive of the issues presented here; it found *United States* v. *Kordel*, 397 U.S. 1 (1970), more to the point. In *Kordel*, this Court held that no

[9] The petitioner, while neglecting *Lefkowitz* v. *Cunningham*, does attempt to distinguish *Baxter* by pointing to the differences between "the exigencies of prison discipline" and the efforts of medical boards to proceed against errant physicians, which he maintains has had lesser importance, and, ex proprio vigore, more constraints attached. Petitioner's order of values, while not surprising, is supported nowhere in the law. Indeed, in *Lefkowitz* v. *Cunningham*, this Court cited no such "exigencies" in its treatment of *Baxter*, although such a factor, did it exist, would have been pertinent in advancing the distinction actually drawn by the Court. *See Lefkowitz* v. *Cunningham*, *supra*.

denial of due process arose from permitting a civil proceeding or civil pre-trial discovery prior to a criminal trial on related charges. In rejecting the petitioner's due process claims, the *Kordel* Court noted:

> It would stultify enforcement of federal law to require a governmental agency . . . invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial. *Id.* at 11.

Similarly, the circuit court here found no reason to undermine the legitimate interest of the Commonwealth in prompt civil action designed to serve important health and welfare goals. Because its holding is in harmony with this Court's views, the petition for certiorari should be denied.

B. *In Rejecting Petitioner's Broad Attack on § 63, the Circuit Court Applied the Limits which this Court has Set as Prudent Guides for Constitutional Adjudication.*

The circuit court limited its analysis of § 63 to physicians who, like petitioner, face simultaneous criminal and civil charges. The court determined that the "strong public interest in promptly disciplining errant physicians" (Pet. App. 26a) precluded a finding that § 63 was unconstitutional.

The petitioner has argued in his petition that the court lacked the power to find the statute constitutional "as applied" to physicians. Rather, he suggests that the court should have considered the constitutionality of § 63 solely on its face, without special regard to the record before it.

This argument contradicts the principles of self-restraint governing federal court analysis of state statutes.

This Court has long recognized that when a court is considering a facial challenge it should proceed with caution so as to avoid unnecessarily interfering with a state regulatory program. *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 217 (1975). In accordance with this rule, courts should not entertain claims that a statute is facially unconstitutional if it is constitutional with regard to the person making the claim. *Young* v. *American Mini Theatres*, 427 U.S. 50, 61 (1976); *Broadrick* v. *Oklahoma*, 413 U.S. 600, 611 (1973). *See United States* v. *National Dairy Products Corp.*, 372 U.S. 29, 33 (1963). Thus, the circuit court was not required to find § 63 constitutional in all its possible applications in order to uphold its constitutionality as applied to petitioner. *Griffin* v. *Breckenridge*, 403 U.S. 88, 104 (1971). Once the court decided that the operation of § 63 would not deprive petitioner of liberty or property without due process, there was no longer a basis for facial analysis. The court could not properly consider whether the statute would be unconstitutional in a different case, at another time or with regard to another person. *United States* v. *Raines*, 362 U.S. 17, 20-23 (1960); *cf. Yazoo & Miss. R.R. Co.* v. *Jackson Vinegar Co.*, 226 U.S. 217, 220 (1912). Furthermore, by limiting its decision to the context of this case, the court below strictly adhered to the rule frequently reiterated by this Court that a court should never formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. *United States* v. *Raines*, *supra*, at 21; *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945).

Finally, petitioner's argument that the court was without sufficient facts to find § 63 constitutional "as applied" is specious. The court made its decision with regard to physi-

cians as a class. Its view that errant physicians present a grave danger to the public safety and that the state has a legitimate interest in quickly disciplining them does not require adjudicative proof. In this sphere of "legislative facts" the members of the circuit court are not required to ignore as judges what they know as men. The court's approach was proper and well-grounded in the record.

III. As Independent Grounds for Decision, the Court Should Deny Certiorari Because Petitioner's Underlying Claim is (A) Not Ripe for Adjudication and (B) Precluded by Principles of Abstention.

The respondents argued to the circuit court that the federal courts lacked jurisdiction over this claim under Article III because it was not ripe for adjudication. Further, they argued that basic principles of federalism call for permitting the state court to address the underlying issues prior to federal court intervention. The circuit court resisted these grounds because they had not been discussed in the district court, and it decided the case on the merits (Pet. App. 23a, n. 2).

Nonetheless, these considerations of jurisdiction and federalism constitute further reasons why granting petitioner's petition would be inappropriate.[10]

[10] The fact that these arguments were not made in the district court should not preclude this Court's consideration of them now. The ripeness argument addresses the question whether there is in fact a "case or controversy" within the scope of Article III. Such an issue can, and indeed must, be raised at any time. *See Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969). Abstention is an equitable doctrine grounded in notions of self-restraint fundamental to the principled exercise of federal power. Absent a showing of injury to a party's rights, there is no reason for an appellate court to decline to consider a request for abstention. "Indeed, it would appear that abstention may be raised by the court *sua sponte*." *Bellotti* v. *Baird*, 428 U.S. 132, 144, n. 10 (1976).

A. *The Record in this Case was Devoid of Evidence to Demonstrate the Existence of a Case or Controversy Ripe for Judicial Intervention.*

Speculation about future events affords an inadequate and unsafe foundation for litigation in the federal courts. Traditionally, this Court has held such speculative questions to be outside the scope of federal jurisdiction. *See, e.g.*, *Laird* v. *Tatum*, 408 U.S. 1, 13-14 (1972); *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89 (1947). This is such a case. The record before the lower courts was devoid of evidence establishing that the board had done anything other than commence a disciplinary proceeding. Petitioner's claim about negative inferences was hypothetical; resolution of the question demanded that the courts intuit both petitioner's defensive strategy in the disciplinary proceeding and the board's likely reaction to it. In particular, petitioner failed to show that the board or its hearing officer would, in fact, draw a negative inference should he refuse to testify in the course of the adjudicatory hearing.

Instead, petitioner's claim required a series of assumptions. First, one had to assume that the board's prosecuting counsel would present a *prima facie* case before the hearing officer, and that petitioner, who would normally wish to testify on his own behalf as to some matters, would decline to testify here in order to protect his Fifth Amendment privilege. It was then necessary to assume that the hearing officer would draw a negative inference from petitioner's refusal to testify, conclude that this inference and the board's evidence es-

tablished its case, and file a decision recommending a sanction.[11]

Because petitioner's claim was brought prematurely, it presents an inchoate record, lacking the concreteness essential for constitutional adjudication. Petitioner's request for further review should therefore be denied.

B. *This Court Should Deny Review Because Principles of Comity Preclude Federal Court Intervention in this Case.*

This Court has held that, where the state has initiated proceedings against an individual and those proceedings are adequate to respond to the legal claims the individual brings to federal court, a federal court may not use its equity power to intrude upon the state proceeding, but must exercise self-discipline in deference to the constraints of the federal system. *Trainor* v. *Hernandez*, ____ U.S. ____, 97 S. Ct. 1911 (1977); *Juidice* v. *Vail*, ____ U.S. ____, 97 S. Ct. 1211 (1977); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975); *Younger* v. *Harris*, 401 U.S. 37 (1971). This doctrine applies to both civil and criminal proceedings. *Juidice*, *supra*, 97 S. Ct. at 1216-1217. This principle of federalism and equity jurisprudence applies with full force to this case.

[11] Even if one were to assume for the sake of argument that all these things would occur, petitioner would have yet to suffer any legally cognizable injury. He would still have an opportunity to file his objections to the hearing officer's recommended decision and argue his case before the board. M.G.L. c. 30A, § 11(7). A principal component of any such argument would, under state law, center on whether substantial evidence existed in the record to support the hearing officer's findings. If such evidence did not exist, the decision could be challenged in the Supreme Judicial Court as unlawful. M.G.L. c. 30A, § 14(7); M.G.L. c. 112, § 64.

Petitioner requested the district court to inject itself into a state civil licensure proceeding which remains in its early stages of development. The proceeding was commenced pursuant to a comprehensive legislative scheme designed to regulate professional practice through the use of expert administrative agencies and well-established administrative law procedures. Two principal components of the state's administrative process are the availability of judicial review to a person aggrieved by final agency action, and the statutory requirement that a reviewing court set aside unlawful agency decisions. *See* M.G.L. c. 30A, § 14(7) (West 1966). Petitioner did not and could not argue that state judicial review under the state APA is inadequate to redress any errors of law which the board might commit.[12] Because judicial review is part and parcel of the disciplinary framework set forth in state law, petitioner's constitutional rights were fully protected by the proceeding already underway which he was seeking to enjoin. Federal court intervention was therefore improper, and any further review of the merits would simply revive the intrusion.

C. *This Court Should Deny Review Because Petitioner is Seeking to Overturn an Ambiguous State Statute Never Interpreted by the Courts of Massachusetts.*

The Supreme Judicial Court of Massachusetts has never construed § 63. Lacking an authoritative state construction, the district court developed its own interpretation and, upon that basis, struck the statute down. The circuit court

[12] *Cf. Boehning* v. *Indiana State Employees Association, Inc.*, 423 U.S. 6 (1975) (individual state statute must be read in conjunction with state administrative procedure act; court of appeals incorrectly concluded that abstention to permit state court construction of entire legislative scheme was unnecessary).

found the issue of interpretation irrelevant, by upholding the constitutionality of § 63 under the more restrictive reading. While this result was a welcome one, the lower courts could have avoided considering the invalidation of a legitimate state regulatory program altogether if they had abstained. The statute is ambiguous, and if a serious constitutional problem were to exist, deference to state court interpretation, under the rule of *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941), would be called for.

Section 63 is the third of four statutes generally applicable to boards of registration which appear in Mass. Gen. Laws Ann. c. 112 (West 1971).[13] On its face, it is straightforward. Its first clause is the only portion applicable to this

[13] The caption to these four sections, as amended by St. 1963, c. 241, § 1, reads as follows: "General provisions relative to each board of registration or examination in the division of registration of the department of civil service and registration." Section 61 authorizes the boards of registration to hold adjudicatory disciplinary hearings and sanction licensed professionals who, after hearing, are found to have behaved in a seriously improper manner. Section 62 preserves the constitutional due process rights of registrants and authorizes the boards to issue subpoenas. Section 63 provides that "[s]aid boards shall not defer action upon any charge before them until the conviction of the person accused, nor shall the pendency of any charge before any of said boards act as a continuance or ground for delay in a criminal action." Finally, § 64 grants the Supreme Judicial Court jurisdiction of complaints for judicial review and bars the court from staying orders of suspension, revocation, or cancellation of a certificate of registration. Properly viewed, then, § 63 is an important component of a comprehensive legislative scheme designed to protect the public from harm at the hands of incompetent, unethical, or untrustworthy professionals. Its importance to this scheme is readily apparent when one recognizes that, in its absence, disciplinary proceedings might be postponed indefinitely were the boards permitted to await the outcome of related criminal cases. The legislature determined sixty years ago that such delay would be harmful to the public interest, and the statute has served since 1917 to preclude untoward postponement of complaints against professionals.

case and simply prohibits the boards of registration from "defer[ring] action upon any charge before them until the conviction of the person accused . . .." In the board's view, this statute does not erase normal scheduling discretion, but simply precludes it from regarding the pendency of criminal charges as an exclusive, dispositive basis for the postponing of agency action. Thus it may not decline to *commence* an adjudicatory hearing *solely because the registrant complained of is subject of a pending criminal charge.* However, the statute should not be read to prohibit the board from exercising prosecutorial discretion, scheduling cases to meet the constraints of its own capabilities or the situations of individual defendants, or, once the board has commenced an investigation, from making any decisions which its regulations, the statutes of the Commonwealth, or the state or federal constitution require. Thus, the board views the statute as a narrow one designed to meet a particular legislative concern, but obviously to be construed in a manner which avoids constitutional difficulties, *see Baird* v. *Attorney General,* ____ Mass. ____, Mass. Adv. Sh. (1977) 96, 100, and one which preserves to the board the discretion it requires to perform its professional disciplinary functions. Whether the state court would adopt this reading — and then construe in such a way to permit continuances in petitioner's situation — is a matter of conjecture. Accordingly, abstention rather than consideration of the merits would be the proper course here. *Cf. Boehning* v. *Indiana State Employees Association, Inc.*, 423 U.S. 6, 8 (1975).

The circuit court has resolved the case by upholding the statute, thereby making abstention unnecessary. The correctness of its views of the merits, coupled with the presence of these ancillary issues which further review of the merits would inevitably revive, militates for denial of certiorari.

Conclusion.

For the reasons set forth above this Court should deny the petition for certiorari.

Respectfully submitted,

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